IN THE

Supreme Court of the United States

FRED MARTIN
Petitioner

vs.

THE STATE OF GEORGIA
Respondent

PETITION FOR CERTIOARI FROM COURT OF APPEALS OF GEORGIA

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioner was charged by way of accusation in the Criminal Court of Fulton County with the offense of "keeping, maintaining, and operating" a lottery in violation of State law. The accusation was filed in fifteen separate and distinct counts, each count charging the same offense, with the exception that each count alleged a different date from the other counts. Each count was concluded by the statement "the date herein alleged being an essential averment as to this transaction."

Petitioner plead not guilty and was tried by a jury. A verdict of guilty was returned and petitioner was sentenced by the court to serve fifteen consecutive sentences of twelve months each, with a further provision that upon the petitioner serving the sentences imposed on the first six counts and payment of a fine of $1000.00 on each of the last nine counts that the sentences on the last nine counts would be suspended.

Motion in arrest of judgment was filed during the same term of court at which sentence was pronounced. The motion was overruled by the court. Writ of certiorari was applied for in the Superior Court of Fulton County and after a hearing in that Court the petition was overruled. Bill of Exceptions was taken to the Supreme Court of Georgia, which was then transferred to the Court of Appeals of Georgia. The Court of Appeals of Georgia affirmed the Superior Court of Fulton County. Application for certiorari was made to the Supreme Court of Georgia. The application was denied with Chief Justice Bell dissenting and Justice Head dissenting.

Petition for certiorari to the Court of Appeals of Georgia is now applied for.

Statement of Basis of Jurisdiction.

Petitioner states that this Court has jurisdiction to review the decision complained of by reason of authority granted in U.S. C.A. Title No. 28, sec. 344 par. (b).

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for

review and determination, with the same power and authority and with like effect as if brought up by appeal, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution * * *"

Petitioner states that the judgment under which he was sentenced, in providing for fifteen consecutive sentences as for misdemeanors is based upon one offense of violating Code Sec. Title 26-6502 of the Code of Georgia of 1933 which Code section is as follows:

> "Any person who, by himself or another, shall keep, maintain, employ, or carry on any lottery or other scheme or device for the hazarding of any money or valuable thing, shall be guilty of a misdemeanor."

Petitioner shows that the remittitur from the Supreme Court of Georgia to the Court of Appeals of Georgia was received by the latter Court June 16th, 1946 and the date of the judgment sought to be now reviewed is therefore June 16th, 1946. Second motion for reconsideration of petition for certiorari in supreme court of Georgia was denied June 12, 1946.

Petitioner shows that the Supreme Court of the United States has jurisdiction of this petition for certiorari because petitioner stands convicted on fourteen of the fifteen counts of the accusation in denial of the 14th Amendment to the Constitution of the United States which provides:

> "* * * nor shall any person be deprived of life, liberty or property without due process of law."

Petitioner asserts this clause of the Constitution as a

basis for this Court's jurisdiction because petitioner has been sentenced by the State Court fifteen times in excess of the statutory punishment for misdemeanor set by State law and has been therefore placed in jeopardy and has been convicted fifteen times for but one offense.

Petitioner further shows that the Court of Appeals of the State of Georgia placed an unwarranted, illogical, illegal and unconstitutional construction on the statute involved in holding and deciding that petitioner could be given fifteen separate punishments for fifteen several dates alleged in the accusation in that said statute creates a continuing offense for which only one punishment may be inflicted fo rthe whole period of time necessary before the institution of the prosecution.

Grounds Upon Which Questions Involved Are Substantial.

The questions involved in this petition for certiorari are substantial and are of gravity and importance in that the liberty of a citizen is involved whereby the court sentenced petitioner to fifteen times the maximum penalty provided by State law for violating a statute which denominates a continuing offense, towit: "to keep, maintain, employ or carry on a lottery".

The question involved in this petition is solely based upon a sentence which it is contended is in violation of the U. S. Constitution, Amendment 14 in that said sentence denies to petitioner due process of law in that he is sentenced to serve fifteen times the maximum sentence provided by State law or fifteen different sentences for one continuous act.

Manner of Raising Constitutional Question.

Petitioner shows that the question involved in this petition for certiorari was raised in the trial court to-wit: The Criminal Court of Fulton County by a motion in arrest of judgment filed during the same terms of court at which the judgment was rendered. (Rec. p. 31.) The motion in arrest of judgment was overruled by the court. (Rec. p. 32.) The question was then raised in the Superior Court of Fulton County on petition for certiorari. (Rec. p. 9.) Upon the certiorari being overruled a bill of exceptions was filed to the Supreme Court of Georgia. (Rec. pp. 1-3.) This latter court transferred the bill of exceptions to the Court of Appeals of Georgia. (Rec. p. 4.) The Court of Appeals of Georgia affirmed the Superior Court of Fulton County on the question presented in the motion in arrest of judgment, holding and deciding that the prosecution may elect to charge a particular offense at a particular time. The Court further held that 15 punishments as for a misdemeanor may be inflicted by the court on the accusation in the present case. Petitioner then filed a motion for rehearing. (Rec. pp. 62-71.) This motion was denied. (Rec. p. 72.) Petitioner then applied to the Supreme Court of Georgia for the writ of certiorari to review the decision of the Court of Appeals. (Rec. p. 74.) The Supreme Court of Georgia, after considering the application for certiorari denied the writ. However, to this order of the Supreme Court in denying the writ of certiorari, all the Justices concurred except Bell, Chief Justice, and Head, Justice, who dissented.

The Question Presented.

Petitioner shows to this Court that these are the questions herein presented, to-wit: (1) "Where a statute

creates an offense, providing for misdemeanor punishment for keeping, maintaining, employing or carrying on a lottery, does this statute create a continuing offense.?"

(2) "If a State court inflicts more than one punishment for the same offense on the same defendant, for violating the same statute, does this increased punishment deny to the defendant due process of law as provided for by the Fourteenth Amendment to the Constitution of the United States?"

(3) "Does a State court deny due process of law to a defendant in violation of Fourteenth Amendment to the United States Constitution where the court inflicts a separate misdemeanor punishment for each day during which the defendant violates the statute?"

Reasons Relied on for Allowance of Writ of Certiorari.

Petitioner relies on the following reasons for the issuance of the writ of certiorari by this court to review the Court of Appeals of Georgia:

1. The decision of the Court of Appeals is in direct conflict with the United States Constitution, Amendment Fourteen providing that no State shall deny to any person due process of law in that fifteen consecutive maximum sentences were permitted to be inflicted by the Criminal Court of Fulton County on petitioner for violating one statute providing for a continuing offense.

2. The decision of the Court of Appeals of Georgia is

in direct conflict with the case of In Re Snow, 120 U. S. 274 holding and deciding that:

> "The rule has obtained that a continuing offense of the character of the one in this case can be committed but once for the purpose of indictment or prosecution, prior to the time the prosecution is instituted."
>
> "The trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions."

3. The Supreme Court of Georgia did not unanimously uphold the Court of Appeals of Georgia in denying the petition for certiorari. The Chief Justice and one Associate Justice dissented from the order denying certiorari.

WHEREFORE, petitioner respectfully prays that the writ of certiorari be granted and that the judgment of the Court of Appeals of Georgia be reversed.

Attorneys for Petitioner in Certiorari.

SUPREME COURT OF THE UNITED STATES

FRED MARTIN
Plaintiff in Certiorari

vs.

STATE OF GEORGIA
Defendant in Certiorari

PETITION FOR CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF OF LAW OF PETITIONER

REFERENCE TO OFFICIAL REPORT

The official report of this case will be found in Volume ——of Georgia Appeals Reports, page——.

GROUNDS OF JURISDICTION

Petitioner was denied due process of law by the Courts of the State of Georgia in violation of Amendment Fourteen of the Constitution of the United States in that petitioner was sentenced by the Criminal Court of Fulton County to serve fifteen consecutive sentences of twelve months each, aggregating a total of fifteen years for violating one statute providing for a misdemeanor punishment of not more than one year. Petitioner contends that this sentence violates the due process clause of the fourteenth amendment to the United States Constitution in that he has been placed in jeopardy and has been sentenced more than one time for the same offense.

Petitioner further shows as a basis of this Court's jurisdiction that the question as to the validity of the fifteen sentences has been passed upon by the Courts of last resort of the State of Georgia and that he has exhausted his remedies in the State courts. The Court of Appeals, in a written opinion, as shown in the preceding reference, upheld the power of the sentencing court to impose such a sentence. The Supreme Court of Georgia, upon a petition for certiorari to review the decision of the Court of Appeals, denied the application. However, Chief Justice Bell and Associate Justice Head dissented from the order denying the petition for certiorari.

An important question is here involved. One involving a fundamental protection guaranteed a defendant not to be imprisoned more than once for the same offense. One involving a serious question of the due process clause of the United States Constitution.

Statement of the Case.

Petitioner was convicted in the Criminal Court of Fulton County upon an accusation charging him with the offense of keeping, maintaining, employing or carrying on a lottery in violation of Title 26-6502 of the Code of Georgia of 1933 which statute is as follows:

> "Any person, who, by himself or another, shall keep, maintain, employ, or carry on any lottery or other scheme or device for the hazarding of any money or valuable thing, shall be guilty of a misdemeanor."

The accusation was brought against petitioner in fifteen

counts. Each count charged him with the same language, except each count charged a different date, all of the fifteen dates being within a period of two years prior to the date of the accusation (the period of the applicable statute of limitation) and each count had appended to it the statement "the date herein alleged being an essential averment as to this transaction." The language of each count was general, that is, it charged the petitioner with keeping, maintaining, operating and carrying on a lottery. No specific transactions were alleged, other than that the date of each count was particularized.

The jury returned a verdict as follows: "We, the jury, find the defendant guilty."

The court sentenced the defendant to fifteen consecutive misdemeanor sentences, providing for twelve months o neach count, each to follow the other. A further order provided that upon defendant serving the sentences imposed on counts one to six and paying a fine of one thousand dollars on each of the other remaining nine counts that the remainder of the sentence should be suspended.

During the same term o fcourt defendant filed a motion in arrest of judgment on the ground that the sentence of the court was in excess of the statutory penalty for a misdemeanor. The motion was overruled by the court. Exception was preserved through the Superior Court of Fulton County upon petition for certiorari and then by Bill of Exceptions to the Court of Appeals. The Supreme Court of Georgia denied application for certiorari to the Court of Appeals with the exception of two dissenting opinions as heretofore set forth.

Specification of Errors.

1. The decision of the Court of Appeals of Georgia in holding and deciding that the Criminal Court of Fulton County could legally sentence petitioner to fifteen consecutive sentences of misdemeanor upon the statute involved was in violation of Amendment Fourteen of the United States Constitution providing that no person shall be denied due process of law.

2. The decision of the Court of Appeals of Georgia in holding and deciding that the State may elect to try the defendant on one general offense of the statute involved or for each day during which the operation of the lottery is involved is contrary to the provisions of Amendment Fourteen of the Constitution of the United States, providing that no person shall be denied due process of law.

Argument.

Petitioner, standing convicted of violating a staute which by its very language denotes a continuing offense is subject to one penalty of misdemeanor only. The misdemeanor statute of Georgia is as follows:

> "Except where otherwise provided, every crime declared to be a misdemeanor shall be punishable by a fine not to exceed $1000, imprisonment not to exceed six months, to work in the chain gang on the public roads, or on such other public works as the County or State authorities may employ the chain gang, not to exceed twelve months, any one or more of these punishments in the discretion of the judge."

The above statute does not authorize a court of Georgia

to sentence a defendant to more than twelve months on the public works and it would certainly be a deprivation of due process of law for a State court to exceed the authority delegated for one violation.

The question for this Court to pass upon therefore, is whether the statute upon which petitioner stands convicted is continuous or whether each day during which the petitioner violates the statute constitutes a separate offense for which a separate punishment may be inflicted.

The wording of the statute in effect makes the violation a continuous offense, subjecting the offender to only one punishment for all the days that he remains in violation preceding the date of the accusation, a sevidenced by the words of the statute, to "keep, maintain, employ or *carry on.*"

> "Carry on, as used in a city ordinance, providing that any person who shall carry on a business for which a license is required, without first taking out such license, shall, on conviction, be fined, etc., implies a continuous operation, so that a person alleged to have carried on a business without a license for some length of time was only guilty of a single offense, and not a separate offense for each day during which the business was carried on."
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> *Nashville, C. & St. L. R. Co. v. City of Attalla,* 24 So. 450, 451. (118 Ala. 362.)

"Carrying on business" means same as "continuing business."

> *Vass v. Conron Bros Co.,* 59 Fed. 2nd 969, 971.
>
> " 'Carrying on business' does not mean the performance of a single disconnected business act, but

means conducting, prosecuting and continuing business by performing progressively all the acts normally incident thereto, while 'doing business' conveys the idea of business being done, not from time to time, but all the time."

Lewellyn v. Pittsburgh, B. & L. Co.,
222 Fed. 177, 185.

Hutchings v. Burnet, 58 Fed. 2nd, 514.

The United States Supreme Court adopted the definition as used in Worcester's Dictionary in the case of Cooper Mfg. Co. v. Ferguson, 5 S.Ct. 739. (113 U. S. 727.) as follows:

"The meaning of the phrase 'to carry on', when applied to business, is well settled. In Worcester's Dictionary the definition is 'to prosecute; to help forward to continue as, to carry on business, etc.' "

Another construction of the words "carry on" will be found in the case of U. S. v. Jackson, 26 Fed. Cases 556 where it was held:

"Selling an occasional drink out of a bottle is not *carrying on* the business of a retail liquor dealer."

The English Courts have also construed the phrase in the case of Sangster vs. Kay, 5 Exch. 386, 387.

"The term 'carry on business' implies some continuous and permanent occupation of a person."

We respectfully submit the foregoing cases in order to show that the Federal Courts, as well as State courts have consistently held that such a phrase as "carry on" when used in a criminal statute, denotes that the continuity of the unlawful enterprise is made the gist of the offense,

and, in some cases, an essential element to constitute a violation of the terms thereof. If such be the case, and the courts consistently hold that it is, then it must necessarily follow that one who enters upon a violatioin of the statute upon which petitioner was convicted and remains a violator, by consistently, day after day, engaging in the same unlawful enterprise, has only done that which is prohibited, that is to say, carried on the prohibited transaction and could therefore be guilty of only one, single, continuous violation.

The question as to whether or not a prosecutor or a Grand Jury may carve out certain perioids of time preceding the bringing of the indictment or accusation for continuing offenses as as to secure separate convictions and cumulative punishments was passed upon by the United States Supreme Court in the case of *In Re Snow*, 120 U. S. 274, wherein it was held:

> "The offense of cohabiting with more than one woman (Act of Congress March 22, 1882) is a continuous act. Snow was convicted separately in a District Court of the Territory of Utah, on three indictments, under that section, covering together a continuous period of time, each covering a different part, but the three parts being continuous, the indictments being found at the same time, by the same Grand Jury, on one oath and one examination of the same witness, covering the whole continuous time. HELD:
>
> (1) There was but one entire offense for the continuous time.
>
> (2) The trial court had no jurisdiction to inflict a punishment in respect of more than one of the convictions."

Further on in the body of the opinion of the Snow case it was held:

> "The rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted."

The following list of cases hold to the same view and principle that continuing offenses can not be split up and made into several offenses:

> "Keeping a gaming house may be continuous act and all the time during which a given house is continuously thus kept prior and up to the prosecution for the keeping, constitutes one indivisible offense, which can be punished but in a single prosecution. Like a civil cause of action, it cannot be split up in the prosecution of it. But one penalty can be assessed."
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> *State v. Lindley,* 14 Indiana 430.
>
> Also see: *1 Chitty's Crim. Law,* 218.
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> *1 Wat. Archb.,* pp. 84, 111.

In the leading case from New York State, Sturgis vs. Spofford, 45 N.Y. 446, the identical same question arose as in the case at bar. An act of the General Assembly of New York provided:

> "All persons employing a person to act as pilot, not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the Board of Commissioners of Pilots the sum of $100."

On an action to recover this penalty it was alleged that

the defendant had violated the provision 46 times and it was set forth in the complaint with particularity the various acts constituting the basis for the action. Judgment was awarded for 46 times the $100 penalty and on appeal to the New York Court of Appeals, it was held as follows:

> "The act is general in its terms. It is the employment of an unlicensed pilot, for which the penalty of $100 is incurred. It does not say for each employment, nor for each offense, nor for each ship unlawfully piloted. Penal statutes are to be construed strictly, and the language will justify the construction that but a single penalty is incurred for all of the alleged unlawful acts of the party prior to the commencement of the action."

The court further stated:

> "It is a wholesome rule not to allow a recovery for aggragated penalties, unless the language of the statute clearly requires it. Under this rule the party prosecuted will have an opportunity to desist from doing the act complained of, and if he does not he will knowingly incur all the hazards of repeated prosecutions. The judgment is affirmed for $100, the amount of one penalty, and reversed as to the residue."

Immediately following this case, an din the next volume o fthe N.Y. Court of Appeals reports will be found the case of Fisher vs. N.Y. Central, 46 N.Y. 644. This case was based upon a similar penalty statute of New York which provided that a penalty of $50.00 together with the costs may be recovered against a railroad for an overcharge in fare. Upon the trial, it was brought out that plaintiff Fisher had travelled upon a certain line of the N.Y. Central Railroad over a period of about two years and that

each time he so travelled he was charged more than the legal rate. Judgment was awarded for a very large sum, on the theory that the railroad was liable to a separate penalty for each violation. Upon Appeal to the New York Court of Appeals it was held as follows:

> "My conclusion is, that but one penalty can be recovered upon the statute under consideration, for all acts committed prior to the commencement of the action. If, after this, it is again violated, another may be recovered in another action commenced thereafter and so on, as long as violations continue."

In the following case from Vermont, a similar ruling was made:

> "The fact is, if the government see fit to go for the offense of being 'a common seller', and the respondent is adjudged guilty, it must, in a certain sense, be considered as a *merger* of all the distinct acts of sale, up to the filing of the complaint, and the respondent cannot be punished but for one offense."
> *State v. Nutt,* 28 Vt. 598.

Again, we respectfully inquire into the decisions of the court of last resort of another state to see if they have passed upon the question and find a case directly in point from the Commonwealth of Massachusetts.

> *Commonwealth v. Robinson,* 126 Mass. 259.
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> "The offense charged in this complaint is that of keeping a tenement for the illegal sale of intoxicating liquors between the first day of Januar yand the twentieth day of August, 1878. If the defendant thus kept the tenement during every hour of the time between those dates, he has committed but one offense. It is true that such offense is continuous in its character."

In another leading case from Kentucky, it was held:

> "The commonwealth could not arbitarily split up a continuous offense, and make what was done in April one offense, what was done in May a second, what was done in June a third, and what was done in July a fourth."
>
> *Cawein v. Commonwealth,* 61 S. W. 275.)
> (Kentucky)

With the foregoing authority, there can be no doubt that the Statute under which Fred Martin was prosecuted and convicted designates a continuing offense and also that a continuing offense ca be committed but once prior to the bringing of a prosecution. With this in mind, we are left to only one more proposition, and that is, does the accusation show on its face that only one offense has been or could be committed? In answer to this we say that it does.

The accusation charges the commission of the offense designated under Code 1933—Title 26-6502. The accusation repeats in all 15 counts allegations which are sufficient to charge a violation of the same section, and the accusation shows on its face that it is the mere will of the prosecutor that arbitarily split up the offense in 15 different parts, or 15 counts.

> "Not only had the court which tried them no jurisdiction to inflict a punishment in respect of more than one of the convictions, but, as the want of jurisdiction appears on the face of the judgment, the objection may be taken on habeas corpus, when the sentence on more than one o fthe convictions is sought to be enforced."
>
> *In Re Snow,* 120 U. S. 274. (Page 285).

We most respectfully submit that the sentences of the trial court on more than one of the counts was absolutely void and that a motion in arrest of judgment will lie to any defect appearing on the face of the record which shows that the judgment is void in any part.

The State also contended in the Court of Appeals that the test for determining whether a crime is continuous in law is whether a duration of time is an essential element of the offense. We heartily agree wit hthe State in this contention. Duration of time is an essential element of the offense and is made so by th ewords contained in the act, *"carry on."*

In the course of the opinion of the Court of Appeals in this case, on this point and immediately following that part of the opinion that is herein complained of is cited the case of Harris vs. State, 193 Ga. 109, 117.

The case cited is quite lengthy and deals with the law of former jeopardy, but from a thorough reading of the Harris case, supra, in the body of the decisioin, a rule is laid down, supported by ample authority, which, if applied to the facts of the case at bar, would authorize a conclusion that the facts in this case set forth only one offense.

The following is the rule laid down by Justice Jenkins in the Harris case, supra:

> "The question as to whether the transaction was the same as a matter of fact can hardly be said to admit of much elucidation. It is true that this question may arise in the class of cases involving an offense which in its very definition and essential na-

ture is continuous in character. In dealing with the question as to whether the offense be of that character, it is sometimes necessary to distinguish between one continuous, uninterrupted single act and a series of distinct and separate acts."

So it is with this case, that it becomes necessary for the court to distinguish between one continuous, uninterrupted single act and a series of distinct and separate acts.

How are we to distinguish the difference between continuous offenses and offenses which are committed each time a single overt act is completed? The answer is clear. We must distinguish them by the wording of the act of the legislature. Can the courts disregard the plain language of a statute? Can the court hold that there is no distinctioin between continuing offenses and single offenses? Were it so, there would be no end to the punishment that could be inflicted to persons who commit trivial offenses over a continued period of time. For instance Snow could have been given a sentence of six months for every day that he cohabited with the seven wives, (In Re Snow, Supra) Cawein could have been punished likewise for each mont hor each day that he operated a pool room, (Cawein v. Commonwealth, supra) Wilson could have been separately punished for each tooth that he pulled, (Wilson v. Commonwealth, supra) ; the tailor for each stitch that he took on the Lord's day or the Baker for each loaf of bread that he baked. Such interpretation of the law, however, was not given to these cases, but instead the rule was laid down in hard and fast terms that no person shall suffer successive punishmests for one offense and that but one punishment may be inflicted for the whole period of time necessary before the institution of the prosecution.

Fred Martin is not asking anything extraordinary in this case and is not asking that he escape prosecution by any frivolous technicalities. He asks that he be given no more punishment than the statute allows for the crime of which he stands convicted. Is the law made for individuals, to be twisted around by prosecutors to suit their own particular moods or grievances or is it made to protect the public by prescribing the punishment for violating the rules of the game to be evenly distributed to those found guilty of wrongdoing, so that every man may know in advance what the limits of his penalty will be for so violating?

It is conceded by petitioner that the evidence against him on the trial of the case was sufficient to support the verdict of guilty and that therefore he must suffer the inevitable, the full measure of misdemeanor punishment, or any lesser amount that the judge of the trial court sees fit to mete out to him. If he is guilty, and the evidence was sufficient to warrant the verdict, then give him the proper punishment according to law that has been given to others that have been convicted of the same offense. This is the spirit of the law and fair and impartial justice demands it.

The State contended in the Court of Appeals that they can "carve out" the time and thereby secure cumulative sentences. The State is evidently not in accord with the following decisioin of the 10th Circuit Court of Appeals, the case of Robinson vs. U.S., 143 Fed. 2nd, 276:

> "Merely because one element of a criminal act embraces two persons or things, a prosecutor may not carve out two offenses by charging the several elements of the single offense in different counts and

designating only one of the persons or things in one count and designating only the other person or thing in the other count."

Petitioner shows that he has been deprived of due process of law by the sentencing court by being sentenced fifteen times for one continuing offense and that this court has the authority to declare the last fourteen sentences null and void and beyond the jurisdiction of the trial court.

Respectfully submitted,

Robert R. Jackson

Attorneys for Petitioner.